SUPREME COURT, U.S.
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No. 96-1342

In The

Supreme Court of the United States

October Term, 1996

AMERICAN BROADCASTING COMPANIES, INC.,

Petitioner,

v.

LUNDELL MANUFACTURING COMPANY, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Should the Court modify the limited purpose public figure test of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) and create a special rule that persons who sell goods to government entities are deemed to be limited purpose public figures for defamation purposes?

2. Should the Court modify the limited purpose public figure test of *Gertz v. Robert Welch, Inc.*, to remove the requirement that the defamation plaintiff attempt to influence the resolution of the particular public controversy giving rise to the defamatory speech?

RULE 29.6 STATEMENT

Pursuant to Rule 29.6, respondent informs the Court of the following:

Lundell Manufacturing Company, Inc. ("Lundell") is a wholly owned subsidiary of Lundell Technologies, Inc. Lundell has no non-wholly owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Lundell Manufacturing Company, Inc. ("Lundell") respectfully requests that the court deny the petition for writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered October 15, 1996. The decision of the Eighth Circuit is reported at 98 F.3d 351 and is reprinted in the appendix of the Petition beginning at 1a.

STATEMENT OF THE CASE

The Petition of American Broadcasting Companies, Inc. ("ABC") is premised on an issue ABC presented in the Court of Appeals as an alternative to its primary arguments, which were: (1) that its broadcast concerning Lundell was not actionable because it was substantially true, and (2) that the Court of Appeals should undertake an independent review of the entire record on the substantial truth issue. (98 F.3d at 355, 359, 362; App. 5a, 13a, 19a) ABC shifted its emphasis and raised only the public/private figure issue in its Petition for Rehearing and Suggestion for Rehearing En Banc. The three judge panel[1] of the Eighth Circuit Court of Appeals denied the Petition for Rehearing and seven of the ten participating circuit judges rejected the suggestion for rehearing en banc. (App. 63a)

Lundell brought a defamation action against ABC for a story which aired nationwide on July 2, 1992 on the

[1] Circuit Judges Wollman, John R. Gibson and Hansen (98 F.3d 354; App. 2a)

ABC network program "World News Tonight with Peter Jennings." The story concerned Berrien County, Georgia's experience with a solid waste recycling machine manufactured and sold by Lundell. The story stated that the recycling machine "does not work." (R. 1-5, 116) When Lundell demanded a retraction, ABC took the position that the statement was true because the machine was mechanically inoperable. (R. 120; App. 17a) Subsequently ABC conceded that the machine was mechanically sound but argued the machine did not work in the sense that it was not financially viable. (App. 4a, 17a) The jury found the statement to be false. (R. 74-75, 80)

A. Course of Proceedings and Disposition of the Case Below.

There was public controversy in Berrien County over its garbage problems and the use of local revenue bonds to fund a solution. (R. 363-366) However, there was no evidence that Lundell tried to influence that public controversy. At trial, ABC's reporter for the story admitted that her investigation for the story uncovered no evidence that the people at Lundell had attempted to inject Lundell into the political debate in Berrien County over these issues. (R. 497) Lundell made it clear to the ABC reporter that Lundell stayed out of the dispute because it was purely political. (R. 497) The trial court found Lundell to be a private figure:

> Lundell is a private-figure plaintiff, and I've not seen anything to change my opinion on that in the evidence here this week. Lundell has not thrust itself into public controversy. In fact, the evidence is that they – what evidence there is on

> that subject is that it attempted to avoid that, the public controversy in Berrien County, Georgia. The mere fact that Lundell Manufacturing sold to a government entity is not sufficient evidence to establish that it is a public figure. (App. 41a)

After an eight day trial, the jury found the "does not work" statement to be false and negligently made and awarded Lundell actual damages of $158,000 for lost profits and $900,000 for injury to its business reputation.[2] (R. 74-75, 80) ABC filed a Renewed Motion for Judgment as a Matter of Law asserting twelve separate grounds for setting aside the jury's verdict, including the claim that Lundell should be deemed a public figure. (R. 86-89) The trial court granted ABC's Motion for Judgment as a Matter of Law on the ground that the challenged statement in the broadcast was substantially true. (App. 31a-36a) Addressing the public figure issue the trial court stated:

> Again, the court is convinced that Lundell is a private figure plaintiff as it has never thrust itself into public controversy and has simply sold machines to industries or endeavors that are significantly regulated. Lundell never attempted to influence the outcome of the public controversy in Berrien County, Georgia. When controversy arose, Lundell refused to get involved. (App. 30a)

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[2] Lundell was assigned the burden of proving falsity under *Philadelphia Newspaper, Inc. v. Hepps*, 475 U.S. 767 (1986). Iowa has adopted a professional negligence standard for private-figure plaintiffs suing media defendants, *Jones v. Palmer Communications, Inc.*, 440 N.W.2d 884 (Iowa 1989) pursuant to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Lundell appealed the trial court's judgment as a matter of law for ABC to the United States Court of Appeals for the Eighth Circuit. In an opinion filed October 15, 1996 (98 F.3d 351) the Eighth Circuit reversed, holding substantial evidence supported the jury's finding that the statement was false. (98 F.3d at 362; App. 18a-19a) The court ordered reinstatement of the jury verdict for Lundell. (98 F.3d at 366; App. 26a)

In considering ABC's alternative argument that Lundell was a public figure, the Court of Appeals analyzed the issue under the test set down in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), as previously followed by the Eighth Circuit in *In Re IBP Confidential Business Documents Litigation* ("Bagley"), 797 F.2d 632, 645 (8th Cir. 1986):

> In determining whether an individual should be considered a limited public figure, we must focus our attention on the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation." *Gertz*, 418 U.S. at 352, 94 S.Ct. at 3013. By doing so we then can determine whether the individual has voluntarily and purposefully injected himself into that controversy in an attempt to influence the resolution of that controversy. *Id.* at 345, 94 S.Ct. at 3009-10.

(98 F.3d at 362-363; App. 19a-20a) The Court of Appeals, applying the *Bagley* decision, first identified the public controversy giving rise to the defamatory speech. "Here, the particular controversy giving rise to ABC's report was the garbage disposal problem in Berrien County." (98 F.3d at 363; App. 20a) The court then continued the analysis:

> After identifying the particular controversy giving rise to the defamation, we then examine the

> "nature and extent" of Lundell's involvement. *Bagley*, 797 F.2d at 645. This inquiry is necessary to determine whether Lundell has "thrust [itself] to the forefront of [this] particular public controvers[y] in order to influence the resolution of the issues involved." *Gertz*, 418 U.S. at 345, 94 S.Ct. at 3009. (98 F.3d at 363; App. 20a)

The Court of Appeals concluded:

> Lundell did not inject itself in the Berrien County controversy. . . . Indeed Chase admitted that she 'did not uncover any evidence from any source that [Lundell] had attempted to inject [itself] into [the] political debate of Berrien County.' . . . ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved.

(98 F.3d at 364; App. 22a) ABC's alternative argument that Lundell was a limited purpose public figure was rejected by the Court of Appeals. (98 F.3d at 364; App. 22a)

ABC filed a Petition for Rehearing With a Suggestion For Rehearing En Banc. In an order entered November 26, 1996 the Court of Appeals denied the Petition for Rehearing and the Suggestion for Rehearing En Banc. (App. 63a)

B. Correction of Misstatements in the Petition.

Pursuant to Supreme Court Rule 15.2, respondent brings the following misstatements of fact and law contained in the Petition to the court's attention.

ABC claims in the Petition that Lundell had "knowledge of the heated public controversy concerning garbage disposal in Berrien County at the time it sought and

obtained a contract with the county to address that problem." (Petition at 7) There was no evidence presented at trial to support this contention. No witness testified that Lundell had such knowledge.

ABC apparently is relying on another misstatement of the trial evidence to support this "knowledge" contention. ABC refers in its Petition to Lundell's "own contemporaneous news clippings file" as evidence that Lundell had knowledge of the controversy before it sold its machine because some of the clippings in the file predated the sale. (Petition at 4 and 7) Again, no evidence was adduced at trial that Lundell was collecting news clippings on the Berrien County controversy before it sold its machine. Vernon Lundell, President of Lundell, testified that he had not even seen the clippings until a few months before the trial in 1994, 6 years after Lundell sold the machine. (R. 289-90)

While Lundell's knowledge of the pre-existing controversy is not relevant to the determination of its public figure status,[3] ABC suggests that the Court of Appeals overlooked this "evidence" in finding Lundell to be a private figure. (Petition at 7) In fact, ABC did not raise

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[3] As the Court of Appeals decision correctly held, it is the plaintiff's role in the controversy, not the controversy itself, that is determinative of public figure status. (98 F.3d at 364; App. 22a) In *Wolston v. Reader's Digest Ass'n*, 443 U.S. 157 (1979) the Supreme Court held: "A private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention." 443 U.S. at 167, 99 S.Ct. at 2707.

the argument below that Lundell's pre-existing knowledge of the controversy determines its public figure status. The Court of Appeals found Lundell to be a private figure because ABC presented no evidence at trial that Lundell injected itself into the controversy or that Lundell attempted to influence the resolution of the controversy. (98 F.3d at 364; App. 22a)

ABC makes additional misstatements with regard to the local publicity surrounding the Berrien County garbage controversy. ABC makes the assertion that "much" of the local media coverage "referred to Lundell and its machinery by name or description." (Petition at 4) The assertion is entirely unsupported by a review of the newspaper articles. Of the approximately *60* articles introduced at trial, only two refer to Lundell by name – one reporting that Lundell would be out to check the equipment and install a new aluminum sorter (R. 1080), and one reporting a Lundell representative would be present for initial startup of the equipment. (R. 1087) All the other media attention concerned local government financing, what participating governments would be charged for hauling in garbage, and whether a voter referendum was necessary for revenue bond financing. (R. 1079-81; 1083-89; 1094-1146) Both the trial court and Court of Appeals found that ABC presented no evidence that Lundell injected itself into these issues or attempted to influence their resolution. (98 F.3d at 364; App. 22a, 30a) ABC does the court a grave disservice in attempting to mischaracterize local media coverage of the controversy and Lundell's role.

ABC makes the claim in its Petition that "Lundell presented its machine, in its own words" as the "solution" to Berrien County's garbage problem. (Petition at 4) ABC neglects to inform the court that Lundell's statement was not publicized in Berrien County, but is merely a slogan used by Lundell in an advertising brochure. (R. 287-288) Lundell did not make this claim in the context of the public debate in Berrien County.

ABC now claims that the public controversy in Berrien County included allegations that the county commission chairman received a commission from Lundell and was later employed as a sales representative by Lundell. (Petition at 4) These charges were so insignificant that ABC did not include either one in its broadcast, (R. 116), and did not argue below that either allegation made Lundell a public figure. Neither allegation appeared in any of the local media articles. (R. 1079-81; 1083-89; 1094-1146)

ABC relies on these factual misstatements to erroneously imply that the Court of Appeals was slipshod in its review of the trial evidence of Lundell's participation, or, more accurately, lack of participation, in the Berrien County controversy. Of equal concern is ABC's persistent mischaracterization of the basis for the Court of Appeals holding that Lundell was not a public figure.[4] The mischaracterization of the Eighth Circuit's opinion is discussed in the next portion of this brief.

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[4] ABC consistently and erroneously states in its Petition that Lundell "thrust" itself into the Berrien County controversy. The trial court and the Court of Appeals found to the contrary. (98 F.3d at 364; App. 22a, 30a)

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT HAS NOT ADOPTED A "SPEECH" TEST FOR DETERMINING WHO IS A LIMITED PURPOSE PUBLIC FIGURE.

Throughout its Petition ABC asserts that the Court of Appeals grounded its decision solely on the fact that Lundell did not speak about the controversy; or avoided comment on the controversy; or chose not to debate the issues; or declined to speak to the press. (Petition at 3, 9, 10, 15)

A review of the Court of Appeals decision demonstrates that nowhere in its opinion did the Court of Appeals adopt a "speech" requirement. (98 F.3d at 362-364; App. 19a-22a) ABC points to no portion of the opinion or any specific language employed by the court to support its characterization of the Court of Appeals holding. ABC erects this strawman to support its argument that the Court of Appeals has created (or exacerbated) a split among the circuits on the *Gertz* limited purpose public figure test. An accurate reading of the Court of Appeals opinion below, and a review of the circuit cases relied on by ABC, dispels any notion of a conflict.

II. THE CIRCUITS HAVE CONSISTENTLY APPLIED THE TEST OF *GERTZ V. ROBERT WELCH, INC.* IN DECIDING THE FACT-BOUND LEGAL ISSUE OF WHETHER A DEFAMATION PLAINTIFF IS A LIMITED PURPOSE PUBLIC FIGURE.

In *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) the court recognized that fact-specific rules for determining a defamation plaintiff's status would be unworkable:

> Because an ad hoc resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority. 418 U.S. at 343-44.

The court in *Gertz* held that those persons deemed limited purpose public figures "have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 418 U.S. at 345. In determining the issue the court looks to "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. The court held that an attorney representing a client in connection with a highly publicized matter was not a public figure where, "He plainly did not thrust himself into the vortex of this public issue, nor did he engage the public's attention in an attempt to influence its outcome." *Id.*

The circuits are in uniformity in their adherence to the *Gertz* analysis. The Court of Appeals opinion below

relied on *Gertz* as interpreted by the prior en banc decision of the Eighth Circuit in *In Re IBP Confidential Business Documents Litigation ("Bagley")*, 797 F.2d 632 (8th Cir. 1986). ABC makes no suggestion in its Petition that *Bagley* departed from the *Gertz* test. In *Bagley* the Eighth Circuit explained the *Gertz* requirement that the court focus its attention on the "nature and extent of an individual's participation in the particular (public) controversy giving rise to the defamation." 797 F.2d at 644, citing *Gertz*, 418 U.S. at 352:

> By doing so, the court will be able to determine whether the individual has voluntarily and purposefully injected himself into the controversy in an attempt to influence resolution of the issues there involved.

797 F.2d at 644-45, citing *Gertz*, 418 U.S. at 345, 351. The Court of Appeals decision below recognized that this is the relevant inquiry under *Gertz*. (98 F.3d at 363, App. 20a)

ABC argues that decisions in the Third and Fifth Circuits conflict with the Eighth Circuit decision below. A review of those decisions and their facts dispels any notion of a conflict.

In *Trotter v. Jack Anderson Enterprises, Inc.*, 818 F.2d 431 (5th Cir. 1987), the Fifth Circuit followed the *Gertz* definition of a limited purpose public figures as those who "thrusts themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved." 818 F.2d at 433 (quoting *Gertz*). The plaintiff was an American lawyer and president of a Guatemalan soft drink bottler. The bottling company was

plagued by violence associated with attempted unionization. The allegedly defamatory news article identified the company, and the plaintiff in particular, as orchestrators of the violence. 818 F.2d at 434. The first article reported on proposals made by some Coca-Cola shareholders concerning the labor troubles. *Id.* Later articles by other authors reported that the shareholders charged that the labor troubles in Guatemala included murder, bribery, and other abuses. *Id.* at 434.

The Fifth Circuit held that the plaintiff was a limited purpose public figure, finding th he played a prominent role in the controversy through his "major responsibility" for the company's labor policy. There was evidence of his behind the scenes influence in the form of a letter from the President of Guatemala threatening plaintiff with expulsion from the country if there were further deaths of union officials. 818 F.2d at 435. The court, as required by *Gertz*, also noted that plaintiff "undertook important efforts to influence the resolution of the shareholder protests." *Id.*

> After he was encouraged by Coca-Cola headquarters to discuss the shareholder resolutions with their authors, he met with them in Chicago in 1977 and in Guatemala in 1978. Trotter also suggested to Coca-Cola that he bring a defamation suit against the authors of the resolutions in order to squelch their activities.

818 F.2d at 435.

The Fifth Circuit's holding in *Trotter* is consistent with *Gertz* and the Eighth Circuit decision in the present case where the inquiry in all three cases is the same – Did the plaintiff "thrust himself to the forefront of a particular

public controversies to influence resolution of the issues involved?" *Gertz*, 418 U.S. at 345.

ABC points also to *McDowell v. Paiewonsky*, 769 F.2d 942 (3rd Cir. 1985), as a decision in conflict with the Court of Appeals decision below. ABC argues that in *McDowell*, "The Third Circuit rejected the very analysis adopted by the Eight Circuit." (Petition at 12) In truth, *McDowell* uses the analysis dictated by *Gertz* and followed by the Eighth Circuit in *Bagley* and the present case:

> We have recently set forth a two-part inquiry for determining whether a defamation plaintiff is a limited purpose public figure. The court must consider (1) whether the alleged defamation involves a public controversy, and (2) the nature and extent of plaintiff's involvement in that controversy.

McDowell, 769 F.2d at 948. (See *Gertz*, 418 U.S. at 352; *Bagley*, 797 F.2d at 644; 98 F.3d at 363; App. 20a)

As one would expect, the facts in *McDowell* differ radically from the facts of the present case. The plaintiff in *McDowell* was an architect who had "a long history" of work on public building projects in the U.S. Virgin Islands. 769 F.2d at 944. In a weekly radio address the defendant Paiewonsky, a senator in the Virgin Islands legislature, made allegedly defamatory remarks concerning the plaintiff's performance on various public building projects. 769 F.2d at 944, 948. The Third Circuit held the plaintiff to be a limited purpose plaintiff figure because

the *plaintiff* and his work on government projects[5] had been the subject of considerable media attention for at least three years preceding the broadcast. One public project had been the subject of two government investigations. A published report by the Attorney General for the Virgin Islands was critical of McDowell in his role as architect on the project. The United States Comptroller for the Virgin Islands published a report on the same project which detailed inadequacies of the architectural plans as a reason for the problems and delays in the project. The Third Circuit concluded:

> Unlike the plaintiff in *Hutchison,*[6] McDowell was the subject of significant public notoriety and scrutiny well before the allegedly defamatory broadcast. . . . Thus it is difficult to maintain that plaintiff was not the subject of intense public attention and a personality of some prominence prior to the April 24 broadcast.

759 F.2d at 949. ABC can point to no evidence demonstrating that Lundell was the subject of "significant notoriety and public scrutiny" or "intense public attention" prior to the ABC broadcast. Media interest in the Berrien County political controversy did not include interest in Lundell or the operational capabilities of its machine. There was no controversy concerning the merits of Lundell's machine until ABC falsely reported that it "does not work."

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[5] The Third Circuit approved the lower court's holding that merely working on government contracts does not transform a person into a limited purpose public figure. 769 F.2d at 949.

[6] *Hutchison v. Proxmire,* 443 U.S. 111 (1979).

Different outcomes from different facts do not evidence a split within the circuits. The inquiry into public figure status is always fact-bound and situation specific. The *Gertz* court recognized that the issue requires consideration of those diverse fact patterns in the context of "broad rules of general application."

ABC's contention of a split among the circuits on the issue, like its contention that Lundell is a limited purpose public figure, fails for lack of evidence.

III. THE RULE SOUGHT BY PETITIONER – TO IMPOSE PUBLIC FIGURE STATUS ON PERSONS WHO SELL GOODS TO GOVERNMENT ENTITIES WITHOUT ATTEMPTING TO INFLUENCE PUBLIC CONTROVERSIES – WOULD UPSET THE BALANCE THAT *GERTZ V. ROBERT WELCH, INC.* AND ITS PROGENY STRIKE BETWEEN FIRST AMENDMENT CONCERNS AND THE STATE'S INTEREST IN PROVIDING A REMEDY FOR DEFAMATORY FALSEHOODS.

The facts of the present case are that Lundell sold its machine to a government entity and made no effort to influence an ongoing local political debate over garbage disposal issues. (98 F.3d at 364) Within this factual context ABC argues for a rule that would transform Lundell and others similarly situated into public figures for defamation purposes. While such a rule would presumably be welcomed by ABC and other media concerns, since it would geometrically expand their protection for negligent publication of false (and injurious) statements of fact, the rule would destroy the balance struck by *Gertz* and later cases between legitimate media concerns under

the First Amendment and "the state interest in compensating injury to the reputation of private individuals." *Gertz*, 418 U.S. at 343.

The rule proposed by ABC has two distinct propositions: (1) that persons who sell goods to government entities should be deemed public figures, and (2) that the *Gertz* requirement of attempting to *influence* resolution of a public controversy be abandoned. Adoption of either proposition, or both, would call into question the viability of *Gertz*, and the circuits' uniform reliance on the *Gertz* test.

Gertz requires inquiry into "the nature and extent of an individual's participation in the particular controversy giving rise to the defamation." 418 U.S. at 352. Does the mere sale of goods constitute "participation" in a local political controversy? In *Hutchison v. Proxmire*, 443 U.S. 111 (1979), the court held that receipt of government grants for scientific research does not transform the recipient into a public figure. 443 U.S. at 135. The court viewed the Petitioner's argument as requesting a return to the "public or general interest" subject matter test of *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 296 (1971) rejected by *Gertz*:

> The 'use of such subject matter classification to determine the extent of Constitutional protection afforded defamatory falsehoods may too often result in an improper balance between the competing interests in this area.'

443 U.S. at 135 (quoting *Time, Inc. v. Firestone*, 424 U.S. 448, 456 (1976)). The *Gertz* focus on the nature and extent of the plaintiff's participation in public controversy is

viewed by the court as striking a fair balance between competing interests of *equal* importance. *Time, Inc. v. Firestone*, 424 U.S. at 456. Adopting a rule that those who sell goods to the government are deemed public figures would destroy the balance that has guided judicial inquiry in this area for the 23 years since *Gertz* was decided.

ABC would have the court hold that selling goods to a local government while a local political controversy is brewing should tip the balance in favor of public figure status for the seller. This focus on the public controversy itself, as opposed to the plaintiff's participation in the controversy, has been rejected. In *Wolston v. Reader's Digest Assn., Inc.*, 443 U.S. at 157 (1979), the court observed:

> A private figure is not automatically transformed into a public figure just by becoming involved or associated with a matter that attracts public attention. To accept such reasoning would in effect reestablish the doctrine advanced by the plurality opinion in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 44, 29 L.Ed.2d 296, 91 S.Ct. 1811 (1971), which concluded that the *New York Times* standard should extend to defamatory falsehoods relating to private persons if the statements involved matters of public or general concern. We repudiated this proposition in *Gertz* and in *Firestone*, however, and we reject it again today.

443 U.S. at 167. The *Wolston* court recognized that a libel plaintiff's attempt to *influence* the public controversy is central to the *Gertz* test:

> Nor do we think petitioner engaged the attention of the public in an attempt to influence the resolution of the issues involved. Petitioner assumed no "special prominence in the resolution of public questions."

443 U.S. at 168 (quoting *Gertz*, 418 U.S. at 351).

For the second prong of its proposed rule, ABC would have the court abandon the "influence" requirement which is central to the *Gertz* analysis. This conclusion is inescapable given the facts of the present case. As the Court of Appeals noted: "ABC does not direct us to any evidence that Lundell placed itself into the controversy to influence the issues involved." (98 F.3d at 364; App. 22a) Abandonment of the "influence" requirement would expand the public figure definition to any person whose name was associated with a public controversy. If participation in the controversy and an attempt to influence its outcome are removed as criteria, the protection this court has provided to private figure libel plaintiffs would vanish.

The determination of a defamation plaintiff's status is a question of federal constitutional law. *Rosenblatt v. Baer*, 383 U.S. 75, 84 (1966). Thus the media is afforded the constitutional protection of having judges, as opposed to juries, determine the plaintiff's status. Respondent assumes ABC has not brought its Petition for the purpose of having the Supreme Court review the Court of Appeals decision and the findings of the trial court with regard to Lundell's private figure status. Mr. Justice Harlan, in his dissent in *Rosenbloom*, presaged the court's determination in *Gertz*, 418 U.S. at 343, that case-by-case review of this issue by the Supreme Court is not workable:

> Once the evident need to balance the values underlying each is perceived, it might seem, purely as an abstract matter, that the most utilitarian approach would be to scrutinize carefully every jury verdict in every libel case, in order to ascertain whether the final judgment leaves fully protected whatever First Amendment values transcend the legitimate state interest in protecting the particular plaintiff who prevailed. . . . But we did not embrace this technique in *New York Times*, supra. . . . We there announced a rule of general application, not ordinarily dependent for its implementation upon a case-by-case examination of trial court verdicts.

403 U.S. at 63. ABC's invitation for the court to depart from those "broad rules of general application", 418 U.S. at 343-44, laid down in *Gertz* should be declined.

IV. COLLATERAL PROCEEDINGS BELOW COULD RENDER THE PETITION MOOT.

On January 23, 1996, ABC, as principal, and Federal Insurance Company, as surety, filed a bond with the District Court. The bond is styled "Judgment in a Civil Case" and a copy is found at pages 4 - 12 of the Appendix of this Brief. On January 28, 1997, Lundell filed a "Motion to Enforce Surety's Liability on Bond", a copy of which is found at page 1 of the Appendix of this Brief. Lundell's motion asks the District Court to enter judgment on the bond against Federal Insurance Company for either the

amount of the bond ($1,750,000.00) or, alternatively, for the total amount of Lundell's judgment[7] against ABC.

On February 14, 1997, ABC filed a Resistance to the Motion. A copy of ABC's Resistance is found at page 13 of the Appendix of this Brief. ABC did not resist the motion on behalf of the surety, Federal Insurance Company, and the surety has made no appearance or resistance in response to the motion.

While ABC's Petition should fail on its merits, respondent brings the pendency of this matter to the attention of the court as a proceeding which could render ABC's Petition moot. If the lower court enters judgment against the surety upon Lundell's motion, the current controversy between Lundell and ABC could be rendered moot if Lundell succeeds in having its judgment against ABC satisfied out of the bond proceeds.

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[7] This procedure is authorized by Federal Rule of Civil Procedure 65.1.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

PAUL D. LUNDBERG
Counsel of Record for Respondent
700 Frances Building
505 - 5th Street
P. O. Box 1828
Sioux City, Iowa 51102
(712) 255-4444

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC.,	CASE NO. C92-4060
Plaintiff,	MOTION TO ENFORCE SURETY'S LIABILITY ON BOND
vs.	
AMERICAN BROADCASTING COMPANIES, INC.,	(Filed Jan. 28, 1997)
Defendant.	

The plaintiff, pursuant to Rule 65.1 FRCP, moves for an order enforcing the liability of the surety, Federal Insurance Company, on the bond filed January 23, 1997, wherein American Broadcasting Companies, Inc. is principal. In support thereof, plaintiff states:

1. On January 23, 1997, defendant American Broadcasting Companies, Inc., as principal, and Federal Insurance Company, as surety, filed a Bond in this action reciting that Federal Insurance Company is "held and firmly bound unto Lundell Manufacturing Company, Inc.," in the sum of $1,750,000.00. A copy of the Bond is attached hereto as Exhibit "A".

2. The Bond, Exhibit "A", and the surety's liability thereon is conditioned as follows:

> and said American Broadcasting Companies, Inc. having appealed from said judgment to the Northern District of Iowa, now therefore, in case the said American Broadcasting Companies, Inc.

shall pay said judgment at the direct (sic) of the District Court, and in all respects abide the orders and judgments of the District Court, then this bond is to be void, otherwise to remain in full force and effect.

3. The surety's liability on the Bond is absolute as American Broadcasting Companies, Inc., has not paid the judgment entered December 19, 1996 (as amended January 16, 1997) and any appeal to the "Northern District of Iowa" has been exhausted.

4. Plaintiff requests that the court enter judgment against Federal Insurance Company in the amount of $1,750,000.00, or, alternatively, for the total amount of the judgment, interest and costs accrued herein.

WHEREFORE, plaintiff prays that the court enter judgment against Federal Insurance Company in the amount of $1,750,000.00, or in the alternative, for the total amount of the judgment, interest and costs accrued herein.

SHULL, COSGROVE, HELLIGE
& LUNDBERG

By /s/ Paul D. Lundberg
Paul D. Lundberg
700 Frances Building
505 – 5th Street
P. O. Box 1828
Sioux City, IA 51102
(712) 255-4444

Attorneys for Lundell
Manufacturing Company, Inc.

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on Jan 28 1997

By: U.S. Mail

Signature /s/ Paul D. Lundberg

Copies to:

Kasey Kincaid
Attorney at Law
400 Capital Square
400 Locust Street
Des Moines, IA 50309

Federal Insurance Company
Two Embarcadero Center
Suite 1500
San Francisco, CA 94111

EXHIBIT "A"

FEDERAL INSURANCE COMPANY
(Surety Address for Service) Bond No. 8145-05-71
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC. Plaintiff, v. AMERICAN BROADCASTING COMPANIES, INC., Defendants.	Case No. C 92-4060 JUDGMENT IN A CIVIL CASE (Filed January 23, 1997)

KNOW ALL MEN BY THESE PRESENTS:

That we, AMERICAN BROADCASTING COMPANIES, INC. as principal and FEDERAL INSURANCE COMPANY, as surety, are held and firmly bound unto LUNDELL MANUFACTURING COMPANY, INC., Plaintiff, the sum of ONE MILLION SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($1,750,000.00), which sum, well and truly to be paid to the Plaintiff we hereby bind ourselves firmly by these presents:

The Condition of the above obligation is such that judgment having been found in the United States District Court for the Northern District, on the 19th day of

December, 1996, against AMERICAN BROADCASTING COMPANIES, INC., Defendants: and said matter having been duly tried of said court and found against the Defendants, AMERICAN BROADCASTING COMPANIES, INC. in the amount of ONE MILLION FIFTY EIGHT THOUSAND DOLLARS ($1,058,000.00) having been adjudged by the court on said judgment plus costs and interest and that the bond on appeal be ONE MILLION SEVEN HUNDRED FIFTY THOUSAND DOLLARS ($1,750,000.00) and said AMERICAN BROADCASTING COMPANIES, INC. having appealed from said judgment to the Northern District Court of Iowa, now therefore, in case the said AMERICAN BROADCASTING COMPANIES, INC. shall pay said judgment at the direct of the District Court, and in all respects abide the orders and judgments of the District Court, then this bond to be void, otherwise to remain in full force and effect.

Signed, sealed and dated this 9th day of January, 1997.

AMERICAN BROADCASTING
COMPANIES, INC.

By /s/ Kasey Kincaid

FEDERAL INSURANCE COMPANY

By /s/ Kathy Calvert
Kathy Calvert, Attorney-in-fact

Premium:$3,563.00

CALIFORNIA ALL-PURPOSE ACKNOWLEDGMENT

State of California

County of Los Angeles

On January 9, 1997 (Date) before me, Tracy Aston, Notary (Name and Title of Officer (e.g., "Jane Doe, Notary Public")) Public, personally appeared Kathy Calvert----------. (Name(s) of Signer(s))

[X] personally known to me – **OR** – [ ] proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

[SEAL]

WITNESS my hand and official seal.

/s/ Tracy Aston
Signature of Notary Public

——— *OPTIONAL* ———

Though the information below is not required by law, it may prove valuable to persons relying on the document and could prevent fraudulent removal and reattachment of this form to another document.

Description of Attached Document

Title or Type of Document: _____

Document Date: _____ Number of Pages: ___

Signer(s) Other Than Named Above: _____

Capacity(ies) Claimed by Signer(s)

Signer's Name: _____

_ Individual
_ Corporate Officer
_ Title(s): _____
_ Partner – [ ] Limited [ ] General
X Attorney-in-Fact
_ Trustee
_ Guardian or Conservator
_ Other: _____

_____

Signer Is Representing:

Federal Insurance Company _____

_____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

Signer's Name: _____

_ Individual
_ Corporate Officer
_ Title(s): _____
_ Partner – [ ] Limited [ ] General
_ Attorney-in-Fact
_ Trustee
_ Guardian or Conservator
_ Other: _____

_____

Signer Is Representing:

_____

_____

RIGHT THUMBPRINT
OF SIGNER

Top of thumb here

POWER OF ATTORNEY
FEDERAL INSURANCE COMPANY
ATTN: SURETY DEPARTMENT
15 Mountain View Road, Warren, NJ 07059
Telephone: (908) 903-2000
Fax No.: (908) 903-3656

Know all Men by these Presents, That FEDERAL INSURANCE COMPANY, an Indiana Corporation, has constituted and appointed, and does hereby constitute and appoint Daniel Ortiz, E.S. Albrecht, Tracy Aston, Kathy Calvert, C.K. Nakamura and Harriet Lambell of Los Angeles, California

each its true and lawful Attorney-in-Fact to execute under such designation in its name and to affix its corporate seal to and deliver for and on its behalf as surety thereon or otherwise, bonds or obligations (other than Bail Bonds) given or executed in the course of its business, and any instruments amending or altering the same, and consents to the modification or alteration of any instruments referred to in said bonds or obligations.

In Witness Whereof, the said FEDERAL INSURANCE COMPANY has, pursuant to its By-Laws, caused these presents to be signed by its Vice President and Assistant Secretary and its corporate seal to be hereto affixed this 11th day of October 1996

Corporate Seal (SEAL)

/s/ Kenneth C. Wendel
Kenneth C. Wendel
Assistant Secretary

FEDERAL INSURANCE COMPANY

By /s/ Frank E. Robertson
Frank E. Robertson
Vice President

STATE OF NEW JERSEY)
) ss.
County of Somerset)

On this 11th day of October 1996, before me personally came Kenneth C. Wendel to me known and by me known to be Assistant Secretary of FEDERAL INSURANCE COMPANY, the corporation described in and which executed the foregoing Power of Attorney, and the said Kenneth C. Wendel being by me duly sworn, did depose and say that he is Assistant Secretary of FEDERAL INSURANCE COMPANY and knows the corporate seal thereof; that the seal affixed to the foregoing Power of Attorney is such corporate seal and was thereto affixed by authority of the By-Laws of said Company, and that he signed said Power of Attorney as Assistant Secretary of said Company by like authority; and that he is acquainted with Frank E. Robertson and knows him to be the Vice President of said Company, and that the signature of said Frank E. Robertson subscribed to said Power of Attorney is in the genuine handwriting of said Frank

E. Robertson and was thereto subscribed by authority of said By-Laws and in deponent's presence.

Notarial Seal (SEAL)

Acknowledged and Sworn to before me on the date above written.

CERTIFICATION

By /s/ Linda Sawchak
Notary Public
LINDA SAWCHAK
Notary Public State of New Jersey
No. 9001052
Commission Expires July 29, 2001

STATE OF NEW JERSEY)
) ss.
County of Somerset)

I, the undersigned, Assistant Secretary of FEDERAL INSURANCE COMPANY, do hereby certify that the following is a true excerpt from the By-Laws of the said Company as adopted by its Board of Directors and that this By-Law is in full force and effect.

"ARTICLE XVIII

Section 2. All bonds, undertakings, contracts and other instruments other than as above for and on behalf of the Company which it is authorized by law or its charter to execute, may and shall be executed in the name and on behalf of the Company either by the Chairman or the Vice Chairman or the President or a Vice President,

jointly with the Secretary or an Assistant Secretary, under their respective designations, except that any one or more officers or attorneys-in-fact designated in any resolution of the Board of Directors or the Executive Committee, or in any power of attorney executed as provided for in Section 3 below, may execute any such bond, undertaking or other obligation as provided in such resolution or power of attorney.

Section 3. All powers of attorney for and on behalf of the Company may and shall be executed in the name and on benalf of the Company, either by the Chairman or the Vice Chairman or the President or a Vice President or an Assistant Vice President, jointly with the Secretary or an Assistant Secretary, under their respective designations. The signature of such officers may be engraved, printed or lithographed. The signature of each of the following officers: Chairman, Vice Chairman, President, any Vice President, any Assistant Vice President, any Secretary, any Assistant Secretary and the seal of the Company may be affixed by facsimile to any power of attorney or to any certificate relating thereto appointing Assistant Secretaries or Attorneys-in-Fact for purposes only of executing and attesting bonds and undertakings and other writings obligatory in the nature thereof, and any such power of attorney or certificate bearing such facsimile signature or facsimile seal shall be valid and binding upon the Company and any such power so executed and certified by such facsimile signature and facsimile seal shall be valid and binding upon the Company with respect to any bond or undertaking to which it is attached."

I further certify that said FEDERAL INSURANCE COMPANY is duly licensed to transact fidelity and surety business in each of the States of the United States of America, District of Columbia, Puerto Rico, and each of the Provinces of Canada with the exception of Prince Edward Island; and is also duly licensed to become sole surety on bonds, undertakings, etc., permitted or required by law.

I, the undersigned Assistant Secretary of FEDERAL INSURANCE COMPANY, do hereby certify that the foregoing Power of Attorney is in full force and effect.

Given under my hand and the seal of said Company at Warren, N.J., this 9th day of January, 1997.

Corporate Seal (SEAL) /s/ Lorrine Miller
Assistant Secretary

IN THE EVENT YOU WISH TO NOTIFY US OF A CLAIM, VERIFY THE AUTHENTICITY OF THIS BOND OR NOTIFY US OF ANY OTHER MATTER, PLEASE WRITE TO US AT THE ADDRESS LISTED ABOVE.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC., Plaintiff,	)	CASE NO. 92-4060
vs.	)	RESISTANCE TO MOTION TO ENFORCE LIABILITY ON BOND (Hearing Requested)
AMERICAN BROADCASTING COMPANIES, INC., Defendant.	)	

Defendant, American Broadcasting Companies, Inc. ("ABC") hereby opposes Plaintiff's motion for an order enforcing liability of the surety, Federal Insurance Company, on the bond filed January 23, 1997, on the following grounds:

1. Following the Eighth Circuit's denial of rehearing, the parties, by counsel, agreed that in lieu of execution of the judgment in this matter pending appeal by ABC to the United States Supreme Court, a bond would be filed with this court. Counsel for the parties also agreed on the amount of the bond. The agreed-upon bond was filed with the court on January 23, 1997.

2. There is no real dispute that in the event the Supreme Court leaves the judgment intact, it will be fully satisfied.

3. The bond, attached to Plaintiff's motion as Exhibit A, contains a typographical error in that it refers to American Broadcasting Companies, Inc. as "having appealed from said judgment *to* the Northern District of Iowa," whereas it should have stated "having appealed from said judgment *in* the Northern District of Iowa."

4. Plaintiff is aware that the erroneous substitution of the word "to" rather than "in" is a typographical error. Plaintiff seeks to subject the language of the bond to a meaning which is contrary to the intent of the parties and which renders the language meaningless and nonsensical.

5. As set forth in the accompanying Memorandum of Authorities, the interpretation of the bond's terms is like that of any other contract, and its purpose and the parties' intent are controlling.

6. ABC and the surety are prepared to file a superseding bond replacing the "to" with an "in." ABC is willing to entertain any other reasonable changes in the bond language suggested by Plaintiff's counsel.

7. ABC, Inc. is in the process of appealing to the United States Supreme court and an order entering judgment against the surety would not only contravene the terms of the bond and the intention of the parties, but would constitute a gross miscarriage of justice.

8. ABC requests the opportunity for oral argument on this motion and resistance.

WHEREFORE, Defendant prays that the Court deny the motion.

FAEGRE & BENSON LLP

By: Kasey Kincaid
Kasey W. Kincaid PK0002817
400 Capital Square
400 Locust Street
Des Moines, IA 50309
515/248-9000
515/248-9010(fax)

ATTORNEYS FOR AMERICAN
BROADCASTING COMPANY, INC.

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for each party to the above entitled cause by enclosing the same in an envelope addressed to each such attorney at his/her last known address as shown below, with postage fully paid, and by depositing said envelope in a United States Post Office depository on the 14 day of February, 1997.

/s/ Illegible

Paul D. Lundberg
Shull, Cosgrove, Hellige & Lundberg
505 5th Street, Suite 700
P.O. Box 1828
Sioux City, IA 51102

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

LUNDELL MANUFACTURING COMPANY, INC., Plaintiff, vs. AMERICAN BROADCASTING COMPANIES, INC., Defendant.	)	CASE NO. 92-4060 AFFIDAVIT OF KASEY W. KINCAID

STATE OF IOWA)
) ss.
COUNTY OF POLK)

1. After the Eighth Circuit's decision denying ABC's petition for rehearing and rehearing en banc, I contacted Paul Lundberg, Lundell's attorney, by telephone.

2. I discussed with Mr. Lundberg ABC's decision to pursue review in the United States Supreme Court. We further discussed filing a bond in order to forestall execution on the judgment during the pendency of the Supreme Court proceedings. Mr. Lundberg agreed with the filing of such a bond and that no action would be taken to execute against the judgment.

3. Mr. Lundberg and I also discussed the amount of the bond. It was agreed that a bond amount of $1,750,000 would be appropriate.

4. The bond was filed with the court on January 23, 1997.

5. ABC is in the process of appealing to the United States Supreme Court.

/s/ Kasey W. Kincaid
Kasey W. Kincaid

Subscribed and sworn to before me by the said Kasey W. Kincaid this 14th day of February, 1997.

/s/ Marsha Rodd
Notary Public in and for the State of Iowa